

FEDERAL CIRCUIT COURT OF AUSTRALIA

(1) *HARCHANDANI v MINISTER FOR
IMMIGRATION & ANOR*

[2016] FCCA 3145

Catchwords:

MIGRATION – Review of decision by Administrative Appeals Tribunal – whether Administrative Appeals Tribunal’s decision affected by jurisdictional error – whether the Tribunal failed to take all relevant considerations into account – whether the Tribunal failed to consider all relevant documents – whether the Tribunal erred in considering whether the applicant and his sponsor were committed to a shared life as husband and wife to the exclusion of all others – whether the Tribunal erred in failing to consider other motivations for the sponsor to marry the applicant – no jurisdictional error – application dismissed.

Legislation:

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), ss.5F, 31, 65, 338, 359A, 359AA, 360, 474

Migration Regulations 1994 (Cth) regs.1.15A, 2.01, cls.820.211, 820.221

Cases Cited:

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476

Minister for Immigration and Border Protection v Ankawijaya [2016] FCAFC

Minister for Immigration and Border Protection v SZSRS [2014] FCAFC 16

Applicant WAAE v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 184

Applicant:

SUNILKUMAR SHANKARDAS
HARCHANDANI

First Respondent:

MINISTER FOR IMMIGRATION AND
BORDER PROTECTION

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number:

SYG 1969 of 2014

Judgment of:

Judge Emmett

Hearing date: 20 October 2016
Date of Last Submission: 14 December 2016
Delivered at: Sydney
Delivered on: 19 December 2016

REPRESENTATION

Counsel for the Applicant: Mr Leonard Karp
Solicitors for the Applicant: Kinslor Prince Lawyers
Counsel for the Respondents: Mr Tim Reilly
Solicitors for the Respondents: DLA Piper Australia

FEDERAL CIRCUIT COURT OF AUSTRALIA AT SYDNEY

SYG 1929 of 2014

SUNILKUMAR SHANKARDAS HARCHANDANI
Applicant

And

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

EX TEMPORE

REASONS FOR JUDGMENT

1. This is an application pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Pt.8, Div.2 of the *Migration Act 1958* (Cth) (“**the Act**”) for judicial review of a decision of the Migration Review Tribunal dated 20 June 2014 and handed down on 23 June 2014 (“**the Tribunal**”).
2. Prior to considering the proceeding before this Court, these Reasons provide the relevant procedural background, a summary of the legislative framework, a summary of the decision of a delegate of the first respondent (“**the Delegate**”), and a summary of the Tribunal’s review and decision.

Background

3. The applicant arrived in Australia on 24 April 2012.
4. On 27 June 2012, the applicant lodged an application for a Partner (Temporary) (Class UK) visa with the Department of Immigration and Citizenship (“**the Department**”) on the basis of being in a marriage with an Australian citizen (“**the Sponsor**”).
5. On 13 November 2012, the Delegate refused the applicant’s application for a partner visa.
6. On 26 November 2012, the applicant lodged an application for review of the Delegate’s decision by the Tribunal.
7. On 20 June 2014, the Tribunal affirmed the decision of the Delegate not to grant a partner visa.
8. On 15 July 2014, the applicant filed an application in this Court seeking judicial review of the Tribunal’s decision.

Legislative framework

9. Pursuant to s.65(1) of the Act, if satisfied of a number of matters, the first respondent may grant a visa. Section 31(1) of the Act provides that there are to be prescribed classes of visa. One class of visa is a Partner (Temporary) (Class UK) visa (reg.2.01 of the *Migration Regulations 1994* (Cth) (“**the Regulations**”) and Schedule 1 to the Regulations).
10. At the time of the Tribunal’s decision, the applicant was required to meet the requirements in cl.820.211(2)(a) of Schedule 2 to the Regulations for the grant of a partner visa, as follows:

“820.21 Criteria to be satisfied at time of application

820.211

...

(2) An applicant meets the requirements of this subclause if:

(a) the applicant is the spouse or de facto partner of a person who:

(i) is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; ...”

11. “Spouse” is defined in s.5F of the Act, as follows:

“Spouse

*(1) For the purposes of this Act, a person is the **spouse** of another person if, under subsection (2), the 2 persons are in a married relationship.*

*(2) For the purposes of subsection (1), persons are in a **married relationship** if:*

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

12. This definition of “spouse” is supplemented by reg.1.15A of the Regulations, as follows:

“1.15A Spouse

(1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

...

(d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses; and

(b) the nature of the household, including:

(i) any joint responsibility for the care and support of children; and

- (ii) the living arrangements of the persons; and*
- (iii) any sharing of the responsibility for housework; and*
- (c) the social aspects of the relationship, including:*
 - (i) whether the persons represent themselves to other people as being married to each other; and*
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) any basis on which the persons plan and undertake joint social activities; and*
- (d) the nature of the persons' commitment to each other, including:*
 - (i) the duration of the relationship; and*
 - (ii) the length of time during which the persons have lived together; and*
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) whether the persons see the relationship as a long-term one."*

13. Under s.338 of the Act, a decision to refuse to grant a partner visa is a decision which may be reviewed by the second respondent.
14. The requirements of the natural justice hearing rule are exhaustively stated in Division 5 of Part 5 of the Act (s.357A of the Act). Division 5 Part 5 includes ss.359A and 360, which provide that:

"359A Information and invitation given in writing by Tribunal

(1) Subject to subsections (2) and (3), the Tribunal must:

(a) give to the Applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review.

360 Tribunal must invite Applicant to appear

(1) The Tribunal must invite the Applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.”

15. Section 359AA of the Act permits the Tribunal to give orally to an applicant clear particulars of any information that the Tribunal considers would be the reason or part of the reason for affirming the decision under review. The Tribunal must ensure that the applicant understands the relevance of the information and the consequences of any information being relied upon. The Tribunal must also invite the applicant to comment on or respond to the information and advise the applicant that the applicant may seek additional time to comment on or respond to the information.
16. Under s.474(2) of the Act, a decision of the second respondent is a “privative clause decision”. Under s.474(1)(a) of the Act, a privative clause decision is final and conclusive.
17. However, a purported decision of the second respondent which is affected by jurisdictional error is not a decision which is made under the Act and therefore is not a privative clause decision (see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476).

The Delegate's decision

18. On 17 August 2012, the Sponsor advised the Department that she was no longer in a married relationship with the applicant and that she wished to withdraw her sponsorship.
19. On 28 August 2012, the Department wrote to the applicant advising him of the withdrawal of the sponsorship. That letter also provided the applicant an opportunity to comment on his relationship status and the circumstances of the break-up within 28 days. The applicant did not respond to the Department's letter.
20. On 9 October 2012, the Department sent an email to the applicant at his email address providing another 7 days to respond. The applicant responded to this email and indicated that he needed more time to resolve the issues with his wife. The Department allowed a further 28 days to the applicant to respond, however, no response was received.

21. The Delegate was satisfied that the applicant and the Sponsor were validly married for the purposes of the Act. However, the Delegate found that the applicant had not provided any evidence to satisfy the Delegate that the applicant and the Sponsor were in a genuine and continuing spousal relationship. In particular, the Delegate found that there was no evidence that the applicant and the Sponsor were living together, or not living separately and apart on a permanent basis. As such, the Delegate found that the applicant was not the spouse of the Sponsor at the time of decision as required by s.5F of the Act and, therefore, did not meet the criteria in cl.820.221(1)(a) of Schedule 2 to the Regulations.
22. Further, the Delegate found that there was no evidence to suggest that the applicant met any other criteria for the grant of a partner visa in circumstances where the sponsorship had been withdrawn, including the death of the Sponsor; any occurrence of relevant family violence; or that there was a child of the relationship.
23. On 13 November 2012, the Delegate refused the applicant's application for a partner visa on the basis that the applicant did not meet the criteria in cl.820.221 of Schedule 2 to the Regulations for the grant of the visa.

The Tribunal's review and decision

24. On 26 November 2012, the applicant lodged an application for review of the Delegate's decision by the Tribunal.
25. On 10 March 2014, the Tribunal wrote to the applicant informing him that the Tribunal had considered the material before it but was unable to make a favourable decision on that material alone. The letter invited the applicant to attend a hearing on 24 April 2014 to give oral evidence and present arguments.
26. On 24 April 2014, the applicant attended the Tribunal hearing and gave evidence.
27. The Tribunal explored the applicant's relationship with the sponsor at the hearing. The Tribunal found that there was very little documentary evidence concerning the existence of a genuine relationship, and that as at the date of the hearing, none of the evidentiary requirements to

satisfy a claim of family violence had been provided. As such, the applicant was allowed until 7 June 2014 to submit any post-hearing materials.

28. On 29 May 2014, the applicant provided the Tribunal photographs of the applicant and the sponsor. Additionally, on 6 June 2014, the applicant provided a variety of material purporting to substantiate the existence of a genuine relationship between the applicant and the sponsor and to support his claim that he had suffered family violence. This material included hotel and travel records; various statutory declarations including one from the applicant's sister, a psychologist, and a social worker; a hospital discharge summary dated 17 August 2012; and an email from the sponsor to the applicant dated 18 August 2012.
29. The Tribunal assessed the applicant's visa application against the criteria in cl.820.211(2)(a) of Schedule 2 to the Regulations which required that the applicant be the spouse or de facto partner of an Australian citizen or permanent resident, or an eligible New Zealand citizen at the time of application.
30. The Tribunal found that the applicant and the sponsor were validly married for the purposes of the Act.
31. The Tribunal noted that the applicant came to Australia in April 2012 and was met at the airport by his sister and the Sponsor. The applicant lived with his sister up until his marriage on 15 June 2012 and from then lived with the Sponsor until 16 August 2012 at the Sponsor's mother's residence in Rockdale. However, the Tribunal noted that there was no documentary evidence showing that the applicant had ever lived at the Rockdale address, except on a discharge summary from a hospital dated 17 August 2012.
32. In relation to his hospital admission on 16 August 2012, the applicant said he was taken there by police following a phone call to the police by his wife. The applicant said that neither he nor the Sponsor had lodged any complaints with the police about each other's behaviour.
33. The Tribunal noted that the applicant said that following their marriage, the Sponsor used to "*torture him*" about money. The applicant said that

the Sponsor was always after him for money and that his visa did not allow him to work. However, the applicant denied that the Sponsor was promised money in return for the marriage. He said that the Sponsor was very controlling, was very impatient for him to go to work and bashed and slapped him.

34. The applicant said that the Sponsor had come to Australia three or four years previously, but he did not know what province in India she came from, except that she lived in Manila in the Philippines at some point. The applicant said that the Sponsor worked for Otis Elevators at Mascot.
35. The Tribunal noted that it put to the applicant that there was very little documentary evidence concerning the existence of a genuine relationship and that to date, none of the evidentiary requirements of his family violence claim has been provided. The Tribunal gave the applicant until 7 June 2014 for the provision of the additional material.
36. Subsequently on 29 May 2014, the Tribunal received 241 photographs of the applicant and the Sponsor, many of which were taken at their wedding and honeymoon. The Tribunal also received some material on 6 June 2014, purporting to substantiate the existence of a genuine relationship and to support a finding that the applicant had suffered family violence.
37. The Tribunal accepted that the applicant was married to the Sponsor on 15 June 2012. However, the Tribunal noted that on 17 August 2012, the Sponsor withdrew her sponsorship and the applicant did not suggest that he was still in a relationship with the Sponsor, but claimed to have been the victim of family violence.
38. The Tribunal noted that the first question was whether the applicant was the spouse of the Sponsor within the meaning of s.5F of the Act at the time of the visa application. The Tribunal noted that in considering whether the applicant and the Sponsor have a mutual commitment to a shared life to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together or do not live separately and apart on a permanent basis, the Tribunal had regard to evidence of the financial and social aspects of the relationship, the nature of the household and the parties' commitment to each other.

39. In short, the Tribunal was summarising the matters for consideration referred to in reg.1.15A of the Regulations in considering those matters. The Tribunal then stated as follows:

“The Department’s file contained no independent evidence that a genuine relationship ever existed. There are statements from the parties and others attesting to the relationship. [The Sponsor’s] sponsorship withdrawal letter gives no clear insight one way or the other as to whether a genuine relationship ever existed between the parties. The tribunal does not have the benefit of [the Sponsor’s] evidence.”

40. The Tribunal noted that following the hearing, it received material including a statement dated 28 May 2014 from Ms Bajaj, the applicant’s sister. The information also included an email dated 18 August 2015 from the Sponsor to the applicant stating *“after much thought and reflections on what has happened in the past, I would like to inform you that I do not want to continue in this relationship any further”*. Further, the information included Statutory Declarations from the applicant, a psychologist and a purported social worker addressing the applicant’s family violence claims.
41. In considering the financial aspects of the relationship, the Tribunal noted that there was no evidence that the parties ever had any jointly owned assets or joint liabilities and no evidence that they ever opened or operated a joint bank account.
42. The Tribunal found that the various material submitted by the applicant suggested that the Sponsor and her mother were expecting money from the applicant. The Tribunal found that, based on the statutory declaration of the applicant’s sister, tensions over financial matters preceded the wedding. The applicant’s sister stated that the Sponsor and her mother taunted the family about financial matters and asked for \$600 a week from the applicant, although he had no income.
43. The Tribunal referred to the statement of Pastor Gaddes, dated 26 May 2014, where he said that the applicant told him that the Sponsor and her mother would demand money from him because they said he owed them for helping him get to Australia. Pastor Gaddes also stated that the applicant told him that he lost his business in India and depleted all

his savings as a result of the continual demand from for money from the Sponsor and her mother, and his consent to give her the money.

44. The Tribunal also found there was no evidence before it about day to day expenses, including no evidence from their respective bank accounts. The Tribunal also found there was no independent evidence as to how the household expenses were arranged, although the Tribunal noted that the applicant said that he had brought money from India which was used for living expenses. However, the Tribunal noted that there was no other corroborative evidence.
45. In relation to the nature of the household, the Tribunal accepted that the applicant stayed at the same Rockdale address as the Sponsor and her mother from June 2012 to 17 August 2012. The Tribunal noted that the applicant was employed for most of this period and also noted that on 7 August 2012, the applicant requested permission to work because the Sponsor had recently been made redundant.
46. In considering the social aspects of the relationship, the Tribunal accepted that, based on the photographs, the applicant and the Sponsor went to Melbourne for a few days and that the applicant's relatives, particularly his sister, attested to the relationship. The Tribunal referred to the applicant's evidence that his sister organised the relationship with the Sponsor and, although emails were exchanged, the applicant first met the Sponsor when he arrived in Australia in April 2012. The Tribunal noted that the applicant and the Sponsor were married 6 weeks later on 17 June 2012 and the visa application was lodged 10 days later on 27 June 2012.
47. The Tribunal noted that the applicant did not declare his relationship with the Sponsor in his visitor visa application, although, they had email communication at this time. The Tribunal found that the applicant and the Sponsor became engaged a few days after their first meeting in Australia in April 2012. The Tribunal also noted that there has been no suggestion that the marriage was arranged in accordance with their culture. It was the applicant's evidence that the decision to marry was based on love. The Tribunal found that this meant that the applicant and the Sponsor had made a commitment to marry within a short period of actually meeting in person. The Tribunal found that a short period between meeting and marrying did not necessarily rule out

the existence of a genuine relationship, and again noted that the parties had been in email communication for a few months before their first meeting.

48. However, the Tribunal found that there was very limited evidence about many aspects of the relationship.
49. The Tribunal was not satisfied that a genuine spousal relationship had ever existed between the applicant and the Sponsor. The Tribunal found, on the evidence before it, that the Sponsor was expecting an undisclosed amount of money, or at least financial support, although it was not clear whether the Sponsor's expectation of financial gain was due to prior promises. The Tribunal found that it was not required to find alternative scenarios as to why the Sponsor married the applicant. The Tribunal found that it was sufficient that the Sponsor was not committed to the relationship and terminated it following the applicant's admission to hospital for self-harm. The Tribunal inferred that the applicant's failure to provide any money was a factor in the break-up of the relationship, having accepted at a prima facie level the existence of a relationship.
50. The Tribunal accepted the applicant's evidence that he believed he was in a genuine relationship, however found there was very limited evidence concerning the exact financial arrangements and nature of the household. The Tribunal found that the applicant "*was not a particularly compelling witness and the tribunal is not prepared to accept his evidence at face value*" about his relationship with the Sponsor. The Tribunal found that there was only a limited amount of objective evidence that supported the existence of a genuine relationship.
51. Ultimately, the Tribunal found that the Sponsor had not had any genuine commitment to the relationship, and, accordingly was not satisfied that the parties had ever been in a genuine relationship in the terms required by cl.820.211 of Schedule 2 to the Regulations. Accordingly, the Tribunal was not required to consider the family violence claims where it was not satisfied that the parties had been in a genuine spousal relationship at the time of application.

52. The Tribunal concluded that the applicant did not satisfy the criteria for the grant of the visa.

The proceeding before this Court

53. On 4 November 2014, the applicant attended a directions hearing before me. I explained to the applicant that this Court has no power to interfere with the decision of the Tribunal, unless the Court is satisfied that the Tribunal's decision is affected by a mistake going to the jurisdiction of the Tribunal. I also explained to the applicant that the grounds of the application made bare assertions that were unsupported by particulars and did not by themselves disclose an error capable of review by this Court.
54. At the directions hearing, the applicant was provided with a copy of the applicable costs schedule of the Court and I explained to the applicant the consequences that would flow to him if a costs order was made against him. Namely, that whilst any costs order remains unpaid, it becomes a debt to the Commonwealth of Australia. As such, the applicant's ability to obtain any other type of visa or re-enter Australia may be significantly affected.
55. The applicant confirmed that he wished to continue with the application for judicial review. The applicant was given leave to file and serve an Amended Application giving complete particulars of each ground of review relied upon, together with any further evidence by way of affidavit, as well as submissions in support.
56. At the directions hearing, the applicant was provided with the contact details of legal services providers and interpreting and translation services in documents headed in his own language.
57. At the request of the first respondent, the matter was listed for a hearing pursuant to r.44.12 of the *Federal Circuit Court Rules 2001* (Cth) ("**the Rules**") on 19 November 2014. A copy of r.44.12 of the Rules was also given to the applicant, together with a copy of the costs schedule.
58. On 19 November 2014, the applicant attended a show cause hearing before me. On that occasion, I was of the view that the matter was appropriate for a final hearing in order to fully canvass the relevant

issues. The applicant was given leave to file and serve an Amended Application giving complete particulars of each ground of review relied upon, together with any further evidence by way of affidavit including any transcript of a hearing before the Tribunal, as well as submissions in support. The matter was then set down for final hearing on 25 May 2016 which was subsequently rescheduled to today.

59. On 2 June 2016, the applicant filed an Amended application.
60. The applicant was represented at the hearing by Mr Leonard Karp, of counsel. Counsel for the applicant confirmed that the applicant relied on the grounds contained in the Amended application filed on 2 June 2016 as follows:

“1. The Tribunal failed to take relevant considerations into account.

Particulars

(a) The matters it was required to consider in Migration Regulations 1.15A(3)(c)(i) and (ii) and 1.15A(3)(d)(iii) and (iv)

2. The Tribunal failed to complete the exercise of its jurisdiction.

Particulars

(a) Failure to consider documents essential to the resolution of the issues in the case being:

(i) The statutory declaration of Maria Tanuraja made on 25 June 2012.

(ii) The statutory declaration of Neal Brian Villena made on 25 June 2012.

(iii) Email sent by the applicant's then intended spouse to the applicant on 3 January 2012.

(iv) Statement of the applicant's then intended spouse dated 27 June 2012.

3. The Tribunal fell into jurisdictional error by misconstruing and misapplying s.5F(2)(b) of the Migration Act.

61. *Particulars*

62. (a) *Error in failing to recognize that a person may have more than one motivation for committing to a shared life as husband and wife to the exclusion of all others.*

63. (b) *Error in failing to ask what other than money (if anything) motivated the applicant's former spouse to marry him.*

64. (c) *Error in finding that it did not have to consider “alternate scenarios” as to why the applicant's former spouse married the applicant.”*

65. Mr Karp commenced his submissions by dealing with Grounds 1 and 2 together.

66. Mr Karp contended that the Tribunal had erred in failing to consider the evidence before it of the social aspects of the applicant's relationship with the Sponsor, and the nature of their commitment to each other. In particular, Mr Karp submitted that the Tribunal had failed to consider evidence before it as to whether the applicant and the Sponsor represented themselves to other people as being in a de facto relationship, and also failed to consider the opinion of the parties' friends and acquaintances about the nature of that relationship. Mr Karp also submitted that the Tribunal failed to consider evidence before it of the nature of the parties' commitment to each other, in particular, the degree of companionship and emotional support that they drew from each other and whether the applicant and the Sponsor saw the relationship as a long term one.

67. In support, Mr Karp referred to *Minister for Immigration and Border Protection v Ankawijaya* [2016] FCAFC 5 at [50] – [51] where Kenny and Griffith JJ stated that matters and considerations set out in a non-exhaustive list of specific matters are relevant considerations which a decision-maker is bound to take into account because the legislation so requires.

68. Mr Karp referred to the evidence particularised in Ground 2 that he submitted the Tribunal failed to consider. Mr Karp contended that that evidence went to the social aspect of the relationship and the nature of the parties' commitment to each other and that the Tribunal had failed

to consider that material where regs.1.15A(3)(c) and (d) of the Regulations made clear that it must.

69. Counsel for the first respondent, Mr Tim Reilly, submitted that the Tribunal did consider the evidence before it in accordance with reg.1.15A of the Regulations, including the documents particularised in Ground 2.
70. The Tribunal stated that the first question for consideration by it was whether the applicant was the spouse of the Sponsor within the meaning of s.5F of the Act at the time of the visa application. The Tribunal found that indeed, the applicant and the Sponsor were in a married relationship. The Tribunal went on to state that in forming an opinion whether the parties have a mutual commitment to a shared life to the exclusion of all others and whether their relationship is genuine and continuing, the Tribunal must have regard to all the circumstances of the relationship, including financial and social aspects of the relationship, the nature of the household and the parties' commitment to each other. The Tribunal then proceeded to do so.
71. As is clear from the detailed summary of the Tribunal's decision above in these Reasons, the Tribunal proceeded to identify and consider those matters referred to in reg.1.15A(3) of the Regulations. Those are the **financial aspects** of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons' commitment to each other.
72. In relation to the financial aspects of the relationship, the Tribunal found that there was no evidence of joint assets or liabilities, that the parties had never opened or operated a joint bank account, and no evidence about day to day expenses.
73. In relation to the nature of the household, the Tribunal made findings as to the living arrangements of the applicant and the Sponsor and found that they lived together between June 2012 and 17 August 2012 only. There was no other evidence before the Tribunal as to the sharing of responsibilities for housework or other living arrangements. The Tribunal found that the applicant requested permission to work from the Department on 7 August 2012 following the Sponsor being made redundant.

74. In relation to the **social aspects** of the relationship, the Tribunal had regard to photographs provided by the applicant and noted that the applicant's relatives, particularly his sister, had attested to the relationship. The Tribunal summarised the sister's statutory declaration as to their initial introduction by her, the email communications they engaged in, the applicant's arrival in Sydney on 24 April 2012 and the first meeting between the applicant and the Sponsor, as well as the financial taunts and demands by the Sponsor and her mother.
75. The Tribunal also had regard to a statutory declaration from Pastor Gaddes that attested to the applicant's alleged abuse from the Sponsor but also said that the Sponsor and her mother would demand money from the applicant because he owed them money because they helped him get to Australia. Pastor Gaddes said that the applicant told him that because of the continual demand for money and the applicant's consent to give his money to the Sponsor, he lost his business in India and depleted all his savings. Pastor Gaddes said that the applicant told him that when he ran out of money, the Sponsor and her mother became much more aggressive until finally the applicant was "*financially, emotionally and physically broke*". Pastor Gaddes attested that he believed that the applicant loved the Sponsor and wished the relationship to work. Pastor Gaddes stated that after the applicant lost everything but his family in India, the Sponsor "*dropped him with no desire to stay together*".
76. Statutory declarations were also provided by two work colleagues of the Sponsor. One was from Ms Tanudjaja, who stated that she believed the relationship to be genuine and that the Sponsor believes in the commitment of marriage and does not take it for granted. The second was from Mr Villena, who said that the marriage was genuine and enduring and that he had seen first-hand that the parties are in love and truly care for each other. He also said that marriage for the Sponsor was for keeps and the marriage ceremony "*radiated the couple's love and devotion towards each other and towards their union of marriage*".
77. The Tribunal did not refer in particular to either Ms Tanudjaja's or Mr Villena's statutory declarations, although noted that there were statements attesting to the relationship. As stated above, the Tribunal found that the Department's file, which contained the statutory

declarations, contained no independent evidence that a genuine relationship ever existed. There was no evidence of any other social interaction with Ms Tanudjaja or Mr Villena in either of their statutory declarations beyond their attendance at the parties' wedding. In the absence of such evidence, their opinion about the nature of the relationship must be of little, if any, weight.

78. In relation to the **nature of the parties' commitment to each other**, the Tribunal noted the evidence before it of the duration of the relationship and made findings accordingly. The Tribunal identified the length of time the parties had lived together. The Tribunal's made findings as to the nature of that relationship and found that the applicant was not a particularly compelling witness and that it was not prepared to accept his evidence at face value about his relationship with the Sponsor. Moreover, as the Tribunal stated, most significantly, it was not convinced that the Sponsor ever had any genuine commitment to the relationship.
79. Those findings were open to the Tribunal on the evidence and material before it, and for the reasons it gave. The Tribunal did take into account all relevant considerations referred to in reg.1.15A(3) of the Regulations in considering whether the parties were in a genuine spousal relationship at the time of application, and concluded that they were not.
80. Accordingly, Ground 1 is not made out.
81. In relation to Ground 2, Mr Karp contended that the Tribunal had failed to consider the evidence of Mr Tanudjaja and Mr Villena as well as an email sent by the Sponsor to the applicant on 3 January 2012, and a further statement from the Sponsor dated 27 June 2012.
82. In relation to the evidence of Ms Tanudjaja and Mr Villena, I do not accept that the Tribunal did not consider that evidence. As stated above, there was no evidence from either of those persons as to any other social interaction or shared activity other than their attendance at the wedding. In the circumstances, their asserted belief that the relationship is genuine may be of so little weight that short of referring to the existence of the statements, which the Tribunal did, it was open to the

Tribunal to find that there was no independent evidence that a genuine relationship ever existed.

83. In relation to the email of the Sponsor dated 3 January 2012, sent before the parties met, there is no reason to infer that simply because the Tribunal failed to identify that email specifically, that it had failed to consider it. The Tribunal specifically said that it was apparent that the parties knew each other through their email communication. However, its finding that there was very limited evidence about many aspects of the relationship was open to it on the evidence and material before it, and for the reasons it gave.
84. In relation to the Sponsor's statement dated 27 June 2012, attesting to the genuineness of the relationship, the Tribunal noted that the Sponsor did not give evidence before it. It was not bound to accept uncritically the contents of that statement and was entitled to prefer the evidence before it in considering whether the relationship was genuine at the time of application. In the circumstances, it was open to the Tribunal to find that the Sponsor did not have a genuine commitment to the relationship. The Tribunal was entitled to place more weight on the evidence before it that the Sponsor and her mother were expecting money, or at least financial support, for the marriage and that a genuine spousal relationship had never existed.
85. In any event, the Tribunal was not required to refer to every item of evidence before it (see *Minister for Immigration and Border Protection v SZSRS* [2014] FCAFC 16 ("**SZSRS**") at [27] and [43] per Katzmann, Griffiths and Wigney JJ; *Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 184 (15 August 2003) at [46] per French, Sackville and Hely JJ).
86. In the circumstances, I do not accept that the material referred to in Ground 2 was in fact overlooked by the Tribunal. In such circumstances, the applicant has not discharged his onus of establishing this within the principle espoused in *SZSRS*.
87. Accordingly, Ground 2 is not made out.
88. Ground 3 asserts that the Tribunal misconstrued and misapplied s.5F(2) (b) of the Act in failing to recognise that a person may have more than

one motivation for committing to a shared life as husband and wife to the exclusion of all others; failing to ask what, other than money, motivated the Sponsor to marry the applicant; and, erred in finding that it did not have to consider “*alternate scenarios*” as to why the Sponsor married the applicant.

89. Section 5F(2)(b) of the Act states that two persons are in a married relationship if they have a mutual commitment to a shared life as husband and wife to the exclusion of all others.
90. A fair reading of the Tribunal’s decision record makes clear that the Tribunal was aware of the criteria to be considered in being satisfied whether a genuine spousal relationship existed at the time of application. The Tribunal concluded that it did not. As stated above, that finding was open to the Tribunal on the evidence and material before it, and for the reasons it gave.
91. Moreover, the Tribunal noted in particular that there had never been a suggestion that this was an arranged marriage in accordance with the culture of the parties. The applicant’s claim was that the decision to marry was based on love. The Tribunal referred particularly to the “*very limited evidence about many aspects of the relationship*”. The Tribunal found that the evidence suggested to it that the Sponsor was expecting an undisclosed amount of money or at least financial support. That finding was open to the Tribunal on the evidence and material before it. Further, the Tribunal stated that it was not clear whether the Sponsor’s expectation of financial gain was due to prior promises. The Tribunal concluded that the Sponsor was not committed to the relationship.
92. It was in the context of those findings that the Tribunal stated that it was not required to find alternate scenarios as to why the Sponsor married the applicant. That is an unremarkable statement that was neither necessary for the Tribunal to make nor significant that it did make such a statement. It was certainly not a statement that demonstrated jurisdictional error.
93. Having found that there was no genuine and continuing relationship at the time of application, the only outcome for the applicant was that he did not satisfy cl.820.211 of Schedule 2 to the Regulations of his visa. I

accept counsel for the first respondent's submission that the Tribunal was under no obligation to make further findings.

94. Accordingly, Ground 3 is not made out.

95. Conclusion

96. A fair reading of the Tribunal's decision record makes clear that the Tribunal understood the claims being made by the applicant; explored those claims with the applicant at a hearing; and, had regard to all material provided in support. The Tribunal put to the applicant matters of concern it had about his evidence and noted the applicant's responses.

97. The Tribunal then made findings based on the evidence and material before it. Those findings of fact were open to the Tribunal on the evidence and material before it and for the reasons it gave. A fair reading of the Tribunal's decision record makes clear that the Tribunal reached conclusions based on the findings made by it and to which it applied the correct law.

98. In the circumstances, the Tribunal complied with its obligations under the statutory regime in the making of its decision, including the conduct of its review.

99. The Tribunal's decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act, this Court has no power to interfere.

100. The proceeding before this Court should be dismissed with costs.

I certify that the preceding ninety-five (95) paragraphs are a true copy of the reasons for judgment of Judge Emmett

Date: 19 December 2016